Mega Sakti Sdn Bhd v Wong Wai Hoi & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W–02–762 OF 2005 AND W–02–1257 OF 2005
MOKHTAR SIDIN, ZULKEFLI AND SURIYADI JJCA
31 JULY 2008

Civil Procedure — Affidavits — Admissibility — Deponent authorised by appellants to affirm affidavit — Whether affidavit by appellants empowering deponent to affirm affidavit on their behalf filed — Whether letters of authorisation were sufficient — Whether deponent stranger to transaction — Whether court has discretion to order any affidavit be struck out

Civil Procedure — Affidavits — Evidence — Credibility of affidavit under scrutiny — Whether courts could demand stricter adherence to rules of evidence — Whether admissible evidence on record

The appellants, who were the purchasers of Desarina Condominium, filed an application for leave to intervene in the proceedings between the respondent (developer of the property) and another party. In the said application, the appellants also prayed for, among others, the setting aside of an order dated 14 August 2003, which ordered that the execution of the winding up order on the respondent be stayed pending the respondent's appeal against the winding up order and/or the disposal of a civil suit between the respondent and another party, whichever is later. The affidavit in support of the application was affirmed by one Dr William Lau Boon Kin, a management consultant ('Dr William'). He was not a purchaser of the Desarina Condominium. In reply to the respondent's allegation that Dr William had failed to adduce any proof that the appellants had given authority to him to affirm the affidavit on their behalf, Dr William tendered an exhibit (WL3) in his affidavit in reply, which were copies of the respective authorisation letters signed by the appellants. The appellants were successful in the leave application but failed to set aside the order dated 14 August 2003. The appellants appealed to the court against the decision not to set aside the order dated 14 August 2003 while the respondent appealed to the court against the granting of the leave prayer.

Held, dismissing the appeal with costs:

(1) Where the evidence will be strongly contested, or the credibility of the

affidavit is under scrutiny, the courts in such circumstances invariably must demand stricter adherence to the rules of evidence. The court may order any contested affidavit struck out if it considers such affidavit as scandalous, irrelevant or otherwise oppressive. With Dr William being a stranger to the whole affair, without an affidavit by any of the appellants empowering him to act on their behalf, the court had no hesitation in rejecting his affidavits. To emphasis on the 'stranger' aspect he could not have any personal knowledge of the sources of any of his assertion or its truth as he never was one of the purchasers (see paras 12–13).

(2) The flaw in the affidavit went to the heart of the matter, discounting any possible suggestion that they were mere irregularities. Being worthless bits of papers, with their contents therefore not worthy of consideration, the application of the appellants was thus without any supporting affidavit (see para 14).

(3) Further, Dr William had said that the facts were obtained from records which he had access to. This blanket statement was unsupported, and had no probative value bearing in mind that he was a management consultant to a company, which had no connection with the respondent. He had not even clarified what the records were, where and how he had obtained them. With no admissible evidence on record, the court was thus precluded from going into the merit of the appeal (see paras 16 & 19).

[Bahasa Malaysia summary

Para perayu yang mana juga adalah pembeli Kondominium Desarina, telah memfailkan permohonan untuk kebenaran bagi mencelah di dalam prosiding di antara responden (pemaju perumahan) dan pihak yang lain. Dalam permohonan tersebut, perayu-perayu juga memohon, antara lain, mengenepikan perintah bertarikh 14 Ogos 2003, yang memerintahkan bahawa pelaksanaan perintah penggulungan terhadap responden ditangguhkan sementara rayuan responden terhadap perintah penggulungan dan/atau penyelesaian guaman sivil di antara responden dan pihak lain, yang mana terdahulu. Afidavit sokongan permohonan tersebut diikrarkan oleh Dr William Lau Boon Kin seorang konsultan pentadbiran ('Dr William'). Beliau bukanlah pembeli Kondominium Desarina. Dalam balasan kepada dakwaan responden bahawa Dr William telah gagal untuk mengemukakan apa-apa bukti bahawa perayu telah memberikan kuasa kepadanya untuk mengikrarkan afidavit bagi pihak mereka, Dr William mengemukakan eksibit (WL3) dalam afidavit balasannya, yang mana adalah salinan surat kebenaran yang ditandatangani oleh para perayu. Para perayu telah berjaya dalam permohonan untuk kebenaran tetapi gagal untuk mengenepikan perintah

A yang bertarikh 14 Ogos 2003. Para perayu merayu kepada mahkamah ini terhadap keputusan yang tidak mengenepikan perintah bertarikh 14 Ogos 2003, sementara itu responden merayu kepada mahkamah ini terhadap keizinan mahkamah atas permohonan untuk kebenaran.

B

Diputuskan, menolak rayuan dengan kos:

(1) Di mana keterangan yang begitu dipertikaikan, atau kredibiliti afidavit dalam penelitian, mahkamah dalam keadaan tersebut mestilah mendesak kepada kepatuhan yang ketat terhadap peraturan dalam keterangan. Mahkamah boleh memerintahkan mana-mana afidavit yang dipertikaikan dibatalkan jika afidavit tersebut dikatakan menimbulkan skandal, tidak relevan atau menindas. Dengan Dr William yang menjadi pihak asing kepada keseluruhan urusan, tanpa afidavit oleh mana-mana perayu yang memberikan kuasa kepadanya untuk bertindak bagi pihak mereka, mahkamah tidak teragak-agak untuk menolak afidavitnya. Bagi menekankan berkenaan dengan aspek 'asing' beliau tidak boleh memiliki apa-apa pengetahuan peribadi terhadap sumber dalam kenyataannya atau ianya adalah benar yang mana beliau tidak pernah menjadi salah seorang pembeli (lihat perenggan 12–13).

(2) Kecacatan dalam afidavit menggagalkan permohonan secara asasnya dengan menolak cadangan bahawa ia adalah ketidakpatuhan semata-mata. Oleh kerana ia menjadi tidak bernilai, dengan kandungannya tidak perlu dipertimbangkan, permohonan perayu adalah tanpa apa-apa afidavit sokongan (lihat perenggan 14)

(3) Seterusnya, Dr William menyatakan bahawa fakta telah diperolehi daripada rekod-rekod yang beliau mempunyai akses terhadapnya. Keseluruhan kenyataan ini tidak disokong, dan tiada nilai probatif mengetahui bahawa beliau adalah konsultan pentadbiran kepada sebuah syarikat, yang tidak berkaitan dengan responden. Beliau juga tidak menjelaskan apa, di mana dan bagaimana rekod tersebut diperolehinya. Tanpa keterangan yang boleh diterima di dalam rekod, mahkamah dengan ini terhalang mempertimbangkan merit rayuan (lihat perenggan 16 & 19).]

Notes

I For cases on affidavits generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 313-497.

Cases referred to

Cantrans Services (1965) Ltd v Clifford [1974] 1 MLJ 141 (refd)

Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17 (refd)
Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd [1999] 3 MLJ 81 (refd)
Minister of Labour, Malaysia v Sanjiv Oberoi & Anor [1990] 1 MLJ 112 (refd)
MUI Bank v Alkner Investment (Pte) Ltd [1990] 3 MLJ 385 (refd)
Rossage v Rossage [1960] 1 All ER 600 (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433 (refd)
UMBC Finance Ltd v Woon Kim Yan Robin [1990] 3 MLJ 360 (refd)

Legislation referred to
Rules of the High Court 1980 O 38 r 2, O 41 r 6

Appeal from: Civil Appeal No W–02–1257 of 2005, Company Winding up No D5–28–526 of 2000 (High Court, Kuala Lumpur)

Raslan Loong (Raslan Loong) for the appellant.
KL Wong (KL Wong) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] Two appeals were set down for hearing before the panel, namely civil appeals W-02–1257 of 2005 and W-02–762 of 2005. Parties had agreed that these appeals be heard together. For easy reference let me state that these appeals had come about as the interveners (hereinafter referred to as the appellants), who were purchasers of the Desarina Condominium, had wanted to intervene in the proceedings between the respondents and another party (hereinafter referred to as the petitioner).

[2] The appellants had filed a summons in chambers requesting for leave to intervene and some other prayers, inter alia, a stay order dated 14 August 2003 be set aside or discharged. That application was supported by an affidavit meant to represent all the interveners. The appellants were successful in that leave application but not the other prayers, amongst them, the setting aside of the said order of 14 August 2003. With the appellants and the respondent being equally unhappy they thus had respectively filed the abovementioned civil appeals of W-02–1257 of 2005 and W-02–762 of 2005. The appellants were dissatisfied because they had failed to obtain the setting aside order whilst the respondent being dissatisfied with the granting of the leave prayer.

[3] For easy reference I herewith reproduce the summons in chambers filed by the appellants:

SUMMONS IN CHAMBERS

LET ALL PARTIES CONCERNED attend before the judge in chambers on the 31 day of March 2005 at … am/pm for the hearing of an application on the part of the abovenamed Applicants/Proposed Interveners for the following orders:

(i) that the abovenamed applicants be granted leave to intervene in the proceeding herein and be made a party hereto;

(ii) that pursuant to the leave granted herein, the abovenamed applicants be at liberty to apply to this Honourable Court for further directions and/or to vary and/or discharge the Order dated 14 August 2003;

(iii) that the Order dated 14 August 2003 be set aside and/or discharged;

(iv) that the abovenamed applicants be granted leave and to be allowed to be heard on both the Summons in Chambers dated 23 October 2004 and 28 October 2004;

(v) that the costs of the application to be provided for; and

(vi) such further and/or other relief …

[4] One Dr William Lau Boon Kin had affirmed on 21 March 2005 the relevant supportive affidavit of the above summons in chambers on behalf of the appellants. Since the legality of his affidavit underwent some scrutiny by the panel, in the course of the hearing, I find it necessary to reproduce a portion of the impugned affidavit. It reads as follows:

I, DR WILLIAM LAU BOON KIN (NRIC NO 451201-08-5657) a Malaysian Citizen of full age and residing at No 21, Lingkungan Desa, Taman Desa, 58100 Kuala Lumpur do hereby solemnly affirm and say as follows:

1. I am a Management Consultant in AGS Management Consultants Sdn Bhd and my spouse, Madam Tan Chin Heng is one of the Applicants/Proposed Interveners in this action and she is also the purchasers of the Desarina Condominium. I am duly authorized by the abovenamed Applicants/Proposed Interveners to affirm this affidavit on their behalf in support of the application filed herein.

2. The facts as deposed to in this affidavit are within my knowledge and/or obtained from records to which I have access save as otherwise stated herein.

3. The Applicants/Proposed Interveners are the Purchasers of the Desarina Condominium (hereinafter to be referred to as 'the Purchasers')...

9. I have caused a file search to be conducted at the Registry and it appears that pursuant to an Order dated 14 August 2003, the

execution of the winding up order dated 7 February 2001 had been stayed pending the outcome of the following:

(a) appeal against the winding up order, and/or

(b) disposal of the Civil Suit No S7–22–667 of 2000 whichever is later and the parties are at liberty to apply to the Court for further directions ...

14. Wherefore, I humbly pray for an order in terms of the application filed herein.

[5] The respondent had replied to the above affidavit of Dr William Lau Boon Kin through the affidavit in reply of one Koh Kien Hong, who was the director of the respondent, and indisputably duly authorised to affirm the affidavit on its behalf. He had affirmed that all the facts deposed by him were within his own personal knowledge and/or derived from the respondent. At para 4, he had affirmed that Dr William Lau Boon Kin failed to adduce any proof whatsoever that the appellant interveners had given authority to him [who was not even a purchaser of the Desarina Condominium] to affirm the said affidavit on their behalf.

[6] In reply to the allegation of that dubious authority, Dr William Lau Boon Kin had replied otherwise, in support of which he had tendered an exhibit marked WL–3, which were copies of the respective authorisation letters signed by them. More of WL–3 later.

[7] So, what was the background of this appellants' application? Mega Sakti Sdn Bhd ie the respondent, was ordered to be wound up by the Kuala Lumpur High Court upon a winding up petition filed by a creditor ie Perumahan NCK Sdn Bhd ('petitioner') vide winding up petition No D5–28–526 of 2000. The appellants, as said above, were the purchasers of the housing project known as the Desarina Condominium to be built by the respondent. The project consisted of 100 units of residential apartments/condominiums and was supposed to be completed sometime in 1997. In the sale and purchase agreement, entered into between the appellants and the respondent, the former had agreed to purchase and the latter to complete and deliver vacant possession of the residential apartments/condominium in accordance with the terms and conditions of the agreement. However, the respondent had failed to complete and deliver vacant possession within the stipulated time frame. The project was subsequently abandoned in 1999.

[8] On 29 April 2002, the respondent was wound up. Being dissatisfied with the winding up order the respondent had appealed to the Court of

A Appeal vide Civil Appeal No W–02–136 of 2001. Pending the outcome of that appeal to the Court of Appeal liquidators were appointed. On 14 August 2003, upon the application made by the respondent, it was ordered, inter alia, by the High Court that the execution of the winding up order be stayed following the outcome of the Civil Suit No S7–22–667 of 2000 filed by the B respondent against the petitioner and the disposal of the respondent's appeal to the Court of Appeal.

[9] Being dissatisfied the petitioner had appealed against that stay order. On 25 February 2004 the respondent's appeal against the winding up order C was dismissed by the Court of Appeal. No further appeal was taken up after the latter decision. Needless to say, in between, a few applications were filed and dealt with.

D **[10]** On 21 March 2005 the appellants, premised on the ground of them being the purchasers of Desarina Condominium, had filed this application under appeal, which takes us back to WL–3. To recount WL3 was supposed to have given authority to Dr William Lau Boon Kin to act on their behalf. Having perused WL–3, undeniably they were letters of authorisation given to E him to sign on the appellants' behalf in relation to the Kuala Lumpur High Court Companies Winding up No D5–28–526 of 2000. He was authorised to do such other acts or things as he deemed necessary or expedient in relation to the legal proceedings and other matters pertaining thereto.

F **[11]** Despite WL–3, the panel apart from realising that Dr William Lau was not a lawyer but a mere management consultant, had noted that no affidavits had been filed by any of the appellants to confirm that he had been so authorised to act for them. How could the panel have accepted the so-called letter of authorisation without any secondary authentication when, G especially in this time and age, forgeries appear more authentic than the original? Interestingly enough even the solicitor, who could have done so, did not come forward to clarify the defects of Dr William Lau's affidavit. Whether this failure was a tactical move or not, no court can give direction about the type of evidence, or the manner of its application, unless directions H have been requested for (*Minister of Labour, Malaysia v Sanjiv Oberoi & Anor* [1990] 1 MLJ 112; *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433. Without any sworn statement consenting to him acting on their behalf, and not a purchaser either, we were satisfied that he was a stranger to the transaction.

I **[12]** The importance of scrutinising Dr William Lau's affidavits could not be ignored as this appeal originated from a 'hearing by affidavit' (O 38 r 2 of the RHC 1980). Such form of hearing is in stark contrast to a trial where evidence is oral and direct. This format is invaluable in circumstances where

witnesses are abroad and therefore unavailable for the trial, or where the evidence is uncontested (*UMBC Finance Ltd v Woon Kim Yan Robin* [1990] 3 MLJ 360). Where the evidence will be strongly contested, or the credibility of the affidavit is under scrutiny, the courts in such circumstances invariably must demand stricter adherence to the rules of evidence (*Malaysian High Court Practice*, 1998 Desk Edition). The court may order any contested affidavit struck out if it considers such affidavit as scandalous, irrelevant or otherwise oppressive (O 41 r 6 of the RHC 1980; *Rossage v Rossage* [1960] WLR 249; *MUI Bank v Alkner Investment (Pte) Ltd* [1990] 3 MLJ 385).

[13] Founded on the above prognosis, with Dr William Lau Boon Kin being a stranger to the whole affair, without an affidavit by any of the appellants empowering him to act on their behalf, we had no hesitation in rejecting his affidavits. To emphasis on the 'stranger' aspect he could not have any personal knowledge of the sources of any of his assertion or its truth as he never was one of the purchasers. In the Federal Court case of *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81 Edgar Joseph Jr FCJ in same vein had opined that a person who was not a party to the relevant transaction naturally had no personal knowledge of the matter. He had said:

> In the present case, the only material relied on by the borrower company in support of the plea of illegality aforesaid was an affidavit by Mr Augustine who claimed to be a representative of the court appointed receiver Tuan Syed Md Amin. Mr Augustine, of course, *was not a party to the transactions and, naturally, had no personal knowledge* of the same. (Emphasis added.)

[14] The flaw in them went into the heart of the matter, discounting any possible suggestion that they were mere irregularities. They being worthless bits of papers, with their contents therefore not worthy of consideration, the application of the appellants were thus without any supporting affidavit. By analogy see the case of *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 1 MLJ 17 where the Court of Appeal had stated:

> An affidavit by a *deponent who has no personal knowledge* of the considerations upon which the decision was based is pure hearsay and is *worthless as evidence* and no court can be expected to pay the slightest attention to it.

[15] To compound the want of personal knowledge, a scrutiny of the affidavit highlighted another glaring flaw ie the source of the information of Dr William Lau Boon Kin. In both affidavits he merely affirmed in this manner:

> The facts as deposed to in this affidavit are within my knowledge and/or obtained from records to which I have access save as otherwise stated herein.

[16] The want of personal knowledge apart, he had said that the facts were obtained from records which he had access to. This blanket statement is unsupported, and has no probative value bearing in mind that he is a management consultant to a company, which has no connection with the respondent. He has not even clarified what the records were, where and how he had obtained them. With the exception of the sales of purchase agreement of his wife, Madam Tan Chin Heng, no other sales and purchase agreements were attached in the first affidavit. He merely said that he would produce them when required to do so by the court. Subsequently in the affidavit in reply, in the form of WL–4, the appellants had filed 27 other sales and purchase agreements, supporting his assertion that some of the appellants were purchasers of the abandoned apartments. Regardless of this clumsy and circuitous route undertaken by the deponent we were still not convinced as there was still a dearth of affidavit to state that the said Dr William Lau Boon Kin had been elected to represent them.

[17] To wind up this issue it is quite elementary that unless a court is satisfied as to the admissible source of the records the information therefore is suspect. To quote Edgar Joseph Jr FCJ in the case of *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Bhd*:

> … it is an elementary proposition sometimes overlooked with resulting confusion and possible injustice that where statements are made by a deponent, based on information and belief these ought not to be looked at all, *unless the court can ascertain not only the source of the information* and belief but also unless the deponent's statement is corroborated by someone who speaks from his own.
>
> (Emphasis added).

[18] In *Cantrans Services (1965) Ltd v Clifford* [1974] 1 MLJ 141 the issue of non-disclosure of sources of information also took centre stage in relation to an affidavit which had been used by the respondent. This was an appeal from the decision of a judge of the High Court dismissing the appellants' application to set aside the order of the senior assistant registrar granting the respondent leave to issue a writ of summons and to serve notice thereof in Canada, outside the jurisdiction of the court. The contract between the parties expressly declared that the contract was to be deemed to be made in British Columbia, Canada. In the course of the hearing the Federal Court, which thereafter had allowed the appeal, had stated:

> It may be noted here that the record does not set out the notes of evidence of the senior assistant registrar at the hearing of the ex parte application, pursuant to which the order of 14 December 1972 was made. The affidavit of the respondent in support thereof did not disclose either his agreement with the appellants or the agreement between the appellants and Majlis Amanah Ra'ayat, both executed on 19 September 1969. The identity of the solicitors or their agents is also not given.

> The report of the agents to the solicitors is not attached. No affidavit by the solicitors or their agents corroborating the respondent's statement in para 7 of his affidavit has been filed herein. … I am of the opinion that there was non-disclosure of material facts sufficient in the light of the two authorities referred to earlier for this court to set aside the order of the learned judge dismissing the application of the appellants.

[19] With no admissible evidence on record we were thus precluded from going into the merit of the appeal, and thus compelled to conclude that the appeal was without merit and hence had it dismissed with costs.

Appeal dismissed with costs.

Reported by Brendan Navin Siva